86-538

Supreme Court, U.S.
FILED
AUG 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER _____

ANN HOCKERSMITH

VERSUS

PARTNER PUBLISHING CO., INC., et al

On Appeal From the United States District Court,
Middle District of Louisiana, State of Louisiana,
Honorable Frank J. Polozola, Judge Presiding

JURISDICTIONAL STATEMENT AND APPLICATION FOR WRIT OF REVIEW AND/OR CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

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Attorney for Ann Hockersmith

QUESTIONS PRESENTED

DOES THE SEVENTH AMENDMENT PROHIBIT THE COURTS OF THE UNITED STATES FROM RE-EXAMINING THE FACTS OR THE PROBATIVE VALUE OF FACTS SUBMITTED TO A JURY?

IS THE GRANTING OF A J/nov BASED ON LACK OF EVIDENCE AN EVIDENTIARY FACTUAL FINDING PROHIBITED BY THE SEVENTH AMENDMENT?

CAN J/nov BE GRANTED ON A FACTUAL ISSUE WITHOUT CONTRAVENING THE SEVENTH AMENDMENT?

LIST OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

Ann Hockersmith, Plaintiff
Arthur Cobb, Attorney for Plaintiff

Publishers Distributing Corporation, Inc., defendant

Flynt Distributing Company, defendant

LFP, Inc.

Hustler Magazine, Inc.

Chic Magazine, Inc.

R. Bruce MacMurdo, Attorney for Publishers and Flynt
10311 Jefferson Hwy., Suite 2 C/D
Baton Rouge, LA 70809

Partner Publishing Co., Inc., defendant

Piccadilly Publication, Inc., defendant

By Attorney for Plaintiff
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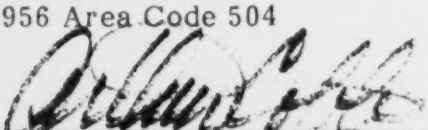

ARTHUR COBB, Trial Attorney

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LOWER COURT ACTION

The jury awarded plaintiff $400,000. The Trial Court granted J/nov based on "lack of evidence" and the Fifth Circuit affirmed.

JURISDICTIONAL GROUNDS IN THIS COURT

The Judgment of the Fifth Circuit is dated 23 May 1986. The time of entry is 23 May 1986. The Statutory Provisions granting jurisdiction in this Court are:

28 USC 2101(c):

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Seventh Amendment:

> AMENDMENT [VII.]
>
> Civil trials
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Supreme Court Rule 17(1)(a):

> Rule 17. Considerations governing review on certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important rea-

sons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

When plaintiff, Ann Hockersmith, was 18 years old, supporting herself and living alone in Florida, she answered a newspaper ad seeking Playboy magazine models. The ad was run by Stuart Citrin. After an initial interview and photography test, Citrin selected Annie and later photographed her on two separate occasions. Annie testified she wrote the words "For Playboy Use Only" on the standard model release form and then signed her name and address on the release. She testified she was not paid anything for the photograph sessions, nor was she given a copy of the photographs taken by Citrin. After the two sessions, there was no further contact between Annie and Citrin.

Later, when she was 21, and on her own initiative, Annie submitted her own photographs to Penthouse Magazine and she was selected to be the cover girl and centerfold model for

the April 1980 issue of Penthouse Magazine. She was quite thrilled with her accomplishment. Besides the $4,000 monetary reward for being a centerfold model, Annie was flown to New York twice and to Brazil, and was now in the running for the lucrative "Pet of the Year" competition sponsored by Penthouse Magazine. Because she was a centerfold model, Annie was one of only twelve models in that competition. The 1980 "Pet of the Year" would receive $250,000 in cash and gifts, an all-expense paid trip around the world, plus a year's salary from the Penthouse Corporation for promotional work. The title "Pet of the Year" is often a springboard for work in motion pictures, television, and public relations. Annie testified she had an oral agreement with Penthouse not to model for any other magazines while she was modeling for Penthouse.

After the April 1980 Penthouse issue was released, the November 1980 issue of Partner Magazine published the photographs of Annie taken by Citrin. Partner Magazine is owned by Partner Publishing Company, Inc. and is distributed by Publishers Distributing Corporation, Inc. which in turn is owned by Flynt Distributing Company, Inc.

The article published in Partner Magazine published Annie's real name and address, referred to her as "our girl", implied she was bisexual, and quoted several men fantasizing what they would do to her. No one associated with Partner Magazine, its publishers or its distributors ever contacted her, asked for her consent to the publication of her photographs, or offered to compensate her in any way, or even informed her that her photographs and the made-up stories about her were used in their magazine.

Approximately one year later, Piccadilly Publication, Inc. published the November 1981 issue of Game Magazine, which also featured the Citrin photographs of Annie. Game used her photographs, called her "Martine" in the article accompanying the pictorial, and quoted "Martine" as a sexual deviant who had an incestuous relationship with her father. No one at Piccadilly Publishing or Game Magazine contacted Annie, sought her consent to use her photographs, or compensated her in any way, or even informed her that her photographs and the made-up stories about her were used in their magazine.

Flynt Distributing Company, Inc. also distributes Game Magazine. The November 1980 issue of Partner sold 338,895

copies at $2.95 per copy. The November 1981 issue of Game sold 216,475 copies at $2.95 per copy.

The Seventh Amendment to the Constitution of the United States prohibits Courts of the United States from re-examining any **fact** found by the jury. When a trial Judge grants a J/nov **based** on "lack of evidence", the trial Judge is re-examining the facts. J/nov can be granted only as to **legal** issues.

Plaintiff sued on defamation, invasion of privacy, and the unauthorized use of her publicity. The jury found that plaintiff had been defamed and her privacy invaded and that defendants were malicious, and awarded her $400,000. The Trial Court granted J/nov based on lack of evidence. The Fifth Circuit Court of Appeals affirmed. Such action by the District Court and the Fifth Circuit Court of Appeals violated her Constitutional rights because the Seventh Amendment prohibits the courts of the United States from re-examining the **facts** or the probative value of facts. Granting J/nov based on "lack of evidence" is an evidentiary **factual** finding and is prohibited by the Seventh Amendment.

FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

28 USC 1332(a)(1):

> § 1332. Diversity of citizenship; amount in controversy; costs
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;

ARGUMENT

This case involves the granting of a motion for J/nov by the trial court judge pursuant to FRCP 50(b). The Fifth Circuit Court of Appeals affirmed. The majority of the jurisprudence supports this action as being properly within the province of the trial court, for such reasons as the trial judge's personal observations, proximity to the issues at hand, etc. In addition, case law does not deprive courts of the power to grant J/nov's for the necessity of preserving justice. There is, however, an equally strong argument suggesting that trial judges operate under strict limitations when granting a J/nov and are not to be quick to tamper with the jury's verdict. See **Metrocare v. Washington**, 679 F.2d 922; **Fireman's v. Videfreeze**, 68 FRD 484; **Treadway v. Brunswick**, 364 F.Supp. 316; and **LaBuff v. Texas**, 126 F.Supp. 759.

FRCP 50(b) was never meant to contravene the Seventh Amendment since FRCP 50(b) itself states, "...a

determination of the **legal** questions raised by the motion..." FRCP 50 is applicable only to **legal** issues and not **factual** issues.

Also, the Seventh Amendment acts as a check on the courts' power to vacate awards. See **Dunn v. Sears**, 639 F.2d 1171 and **Lucas v. American**, 630 F.2d 291; and prohibits a re-examination of the facts found by the jury. See **Lehrman v. Gulf**, 464 F.2d 26; **Wood v. Diamond**, 691 F.2d 1165; and **Atlantic v. Gulf**, 82 S.Ct. 780. A new trial is preferable to tampering with the jury's verdict. See 1912 opinion of **Slocum v. New York**, 33 S.Ct. 523, in which holding to that effect has never been overruled despite attempts to do so in **Aetna v. Kennedy**, 57 S.Ct. 809.

The Supreme Court's adoption of the Federal Rules of Civil Procedure seems to co-exist in direct contradiction of its pronouncements on the constitutional rights of litigants, especially in the case of one's Seventh Amendment rights versus the efficiency and expediency of J/nov's and their similar motions of directed vedicts and summary judgments. In certain types of cases, the Court will ensure Seventh Amendment protection, as can be seen in the FELA and Jones Act cases. See **Lavender v. Kurn**, 327 U.S. 645, 66 S.Ct. 740

(1946), where the court will reverse the District Court if the judge takes away from the province of the jury. These cases seem to be sui generis, however, as special statutes buttress the plaintiff's jury trial rights and therefore the rules that apply in these types of cases have not been applied across the board.

The Supreme Court has most recently upheld the constitutionality of Rule 50(b) in the 1967 case of **Neely v. Martin**, 87 S.Ct. 1072 (1967), citing **Montgomery v. Duncan**, 61 S.Ct. 189, (1940) for the proposition that Rule 50(b) does not violate one's Seventh Amendment right to a jury trial. The court seems quite protective of the Federal Rules yet is also adamant about the restraint that judges must exercise. **Connell v. Sears**, 722 F.2d 1542 (Fed. Cir. 1983), lists certain guidelines that courts must follow in order to avoid Seventh Amendment problems.

In addition, some case law outlining the progressive gains made by federal court judges over the state courts' powers might prove helpful (the elimination of the state court standard of "scintilla of evidence", replaced by the somewhat flaky "reasonable man" test of the federal courts, and the application of federal standards as opposed to state court

standards in diversity jurisdiction cases) in demonstrating the federal judges' abuse of their right to grant a J/nov.

CONCLUSION

It is extremely important that the right to trial by jury remain inviolate.

The Seventh Amendment is a **prohibition** against **Judges** and holds down the authority and power of the **Judges**, yet it is the very same **judges** who interpret the Seventh Amendment and who are **reluctant** to tie their own hands with the provisions of the Seventh Amendment. These Judges have found ways to read FRCP 50 in such a way as to allow "re-examination" of the **facts** presented to the Jury. Rule 50 allows J/nov as a matter of law only - otherwise, it would contravene the Seventh Amendment.

Here, the District Court and the Fifth Circuit Court of Appeals has so far sanctioned such a departure from the true meaning of the prohibition in the Seventh Amendment that such a departure (J/nov **on facts**) conflicts with a Constitutional Amendment and this Court is called upon to exercise its power of supervision.

Respectfully Submitted:
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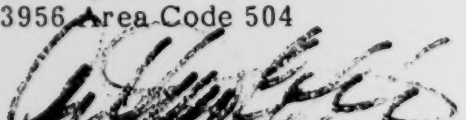


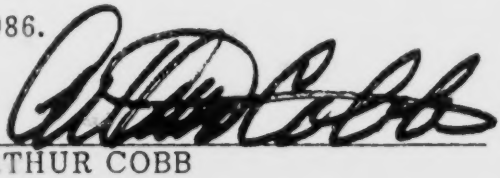
ARTHUR COBB, Trial Attorney

CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

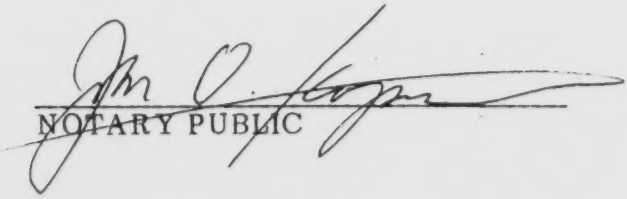
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared ARTHUR COBB, who, after first being duly sworn by me, did depose and say that the allegations of the Petition for Writ of Review and/or Certiorari are true and correct to the best of his knowledge, information and belief, and that three copies of the same has been mailed to R. Bruce MacMurdo on 9 September 1986.



ARTHUR COBB

SWORN TO AND SUBSCRIBED before me on 9 September 1986.



NOTARY PUBLIC

86-538

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SUPREME COURT OF THE UNITED STATES

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ANN HOCKERSMITH

VERSUS

PARTNER PUBLISHING CO., INC., et al

On Appeal From the United States District Court,
Middle District of Louisiana, State of Louisiana,
Honorable Frank J. Polozola, Judge Presiding

APPENDIX

ARTHUR COBB LTD
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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ANN HOCKERSMITH — CIVIL ACTION

VERSUS — NUMBER 81-965-B

PARTNER PUBLISHING COMPANY, INC., ET AL

Jury Interrogatories

Answer "Yes" or "No"

1. Do you find that Ann Hockersmith was defamed by the publication of the pictures and article of her in Partner Magazine in November, 1980? Yes ✓ No ___

2. Do you find that Ann Hockersmith was defamed by the publication of the pictures and article of her in Game Magazine in November, 1981? Yes ✓ No ___

3. Do you find that Ann Hockersmith's privacy was invaded by the publication of the pictures and article in Partner Magazinne in November, 1980? Yes ✓ No ___

4. Do you find that Ann Hockersmith's privacy was invaded by the publication of the pictures and article in Game Magazine in November, 1981? Yes ✓ No ___

5. Did the publishers act with actual malice in publishing the pictures and article in

(a) Partner Magazine in November, 1980?) Yes ✓ No ___

(b) Game Magazine in November, 1981? Yes ✓ No ___

If your answers to 5(a) and 5(b) were no, proceed to question 9.

If your answer to either 5(a) and 5(b) was yes, answer questions 6 through 8.

6. Do you find that the distributors knew or had reasons to know that the photographs and printed material were defamatory prior to distribution? Yes ✓ No ___

7. Do you find that the distributors acted with actual malice in the distribution of Partner Magazine in November, 1980? Yes ✓ No ___

8. Do you find that the distributors acted with actual malice in the distribution of Game Magazine in November, 1981? Yes ✓ No ___

9. Do you find that plaintiff's right to publicity was violated by

(a) the publishing company? Yes ___ No ✓

(b) the distribution company? Yes ___ No ✓

If your answers to either 5(a), 5(b), 9(a) or 9(b) were yes, please answer the following questions. If all of the answers to 5(a), 5(b), 9(a) and 9(b) were no, you need not proceed any further.

10. Do you find that the publishing companies exercised total actual control over the distributing companies?

Yes ✓ No ___

11. What damages, if any, is plaintiff entitled to recover for the damages?

$ 4,000,000

12. Do you find that Ann Hockersmith contributed to her own damage by consetning to allow her photographs and articles to be used?

Yes ___ No ✓

13. If your answer to No. 12 is Yes, what percentage of fault did Ms. Hockesmith's action contribute to her damage?

Specify percent from 0% to 100%

0 %

Baton Rouge, Louisiana
November 8, 1983

/s/ James M. Baker
Jury Foreman

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
MAY 14, 1985
POLOZOLA, J.

ANN HOCKERSMITH — CIVIL ACTION

VERSUS — NUMBER 81-965-B

PARTNER PUBLISHING COMPANY, INC., ET AL

This case was originally tried to a jury which rendered a judgment in favor of the plaintiff in the sum of $400,000. This matter is now before the Court on several post-trial motions. Plaintiff has moved for alteration of the jury verdict, for a judgment n.o.v., and for reconsideration of this Court's ruling granting a new trial. The defendants have moved for reconsideration of the Court's denial of the defendants' motion for a directed verdict and for judgment n.o.v. No oral argument is required on these motions.

By minute entry of December 2, 1983, this Court granted defendants' motion for a new trial, reserving the right to determine whether a directed verdict or a judgment n.o.v. should be granted. The defendants' motion for judgment n.o.v. was denied by this Court per minute entry of June 26, 1984. The parties have requested the Court to reconsider its earlier rulings. Upon reconsideration of all the

evidence, the Court finds that after viewing the evidence most favorably to the plaintiff and giving plaintiff the benefit of all reasonable inferences from the evidence, the facts and inference point so strongly and overwhelmingly in favor of the defendants that reasonable persons could not render a verdict in favor of the plaintiff.[1] Therefore, for reasons which follow, the Court hereby vacates its order of December 2, 1983, granting a new trial and now orders that a directed verdict and judgment nothwithstanding the verdict be entered in favor of the defendants.

Ann Hockersmith brought this suit against the publishers of Partner and Game magazines, Partner Publishing Co. and Piccadilly Publications, Inc. ("publishers") and the distributors of those magazines, Publishers Distributing Corp. and Flynt Distributing Co. ("distributors"). Plaintiff alleged that she was defamed and her privacy invaded when nude and semi-nude photographs of her were published in the magazines published and distributed by the defendants without plaintiff's knowledge or consent. The defendants contend that they relied on the written model releases[2] signed by plaintiff which were furnished to publishers by Stuart Citrin[3], a freelance photographer from whom publishers purchased the photographs of plaintiff. The defendants further contend that plaintiff is a public person as

to the readership of "girlie" magazines and that there was no evidence of actual malice on the part of the defendants presented at the trial of this case.

After a trial on the merits, the jury returned a verdict in favor of plaintiff in the sum of $400,000. In response to the interrogatories propounded to them, the jury found that both the distributors and the publishers acted with actual malice. This Court is of the opinion, however, that no evidence was adduced at trial which could in any way support a verdict in favor of the plaintiff.

Plaintiff offered no evidence of actual malice on the part of either the publishers or the distributors. When plaintiff allowed nude and semi-nude photos of herself to be published in Penthouse, she "invite[d] attention and comment" to herself.[4] Insofar as the readers of Penthouse and other magazines of that genre are concerned, she became a public figure.[5] Her status as a public figure is further supported by the fact that she was a "Pet of the Month" in the Penthouse magazine and as such enjoyed front cover and center-fold prominence in that issue of the magazine. Thus, she has the burden of proving that the defendants acted with actual malice, i.e., actual knowledge of the defamatory nature of the publication or reckless disregard of the truth. New York Times v. Sullivan, 376 U.S. 254 (1964).

The standard release upon which defendants relied authorized the photographer or his assigns to publish photographs of plaintiff in conjunction with her own or a ficticious name "for any purpose whatsoever, including the use of any printed matter in conjunction therewith."[6] The document further released any firm publishing or distributing the photos from liability as a result of distortion, alteration, or use in composite form of the photos "even should the same subject me to ridicule, scandal, reproach, scorn or indignity."[7] Plaintiff offered no evidence to show that the release was obtained through any fraud or misrepresentation on the part of defendants or that the defendants had any reason whatsoever to doubt the validity of the release. To the contrary, the evidence presented at the trial revealed that the release was a standard form release used in the industry and was presented to the defendants in the ordinary course of business. There was no evidence presented that the defendants knew or should have known of the circumstances under which Citrin obtained the release from the plaintiff. Plaintiff testified that she added the words "For Playboy use only" to the release before signing it, although this addition is not found on the copies of the release introduced at trial. Furthermore, although plaintff contends she limited the use of her photographs to Playboy magazine, it is clear that

plaintiff did not object to having her photographs and the stories used in connection therewith published in Penthouse magazine. In fact, plaintiff testified at the trial that had the photographs and stories which she now complains of been published in Penthouse magazine or any other magazine of a similar nature, she would not have objected. Furthermore, the stories published in Game and Partner contain many excerpts from the stories published in the Penthouse magazine. Taking this evidence in the light most favorable to the plaintiff for purposes of this motion, there is still no evidence of actual malice on the part of the defendants, nor is there evidence that the defendants knew or had reason to know that the release was not valid or had allegedly been altered.

Plaintiff also failed to introduce evidence of actual damage. Plaintiff contended that because of the publication of her photos in defendants' magazines she lost the opportunity to receive approximately $200,000 in cash and prizes which would have been hers had she been selected Penthouse Pet of the Year. However, Jeff Zelmanski, the Pet promotions director of Penthouse, testified that plaintiff's appearance in defendant's magazines had no relation to her not being chosen "Pet of the Year."[8] Zelmanski testified that he prepared a summary on each "Pet

of the Month" to be used in selecting the "Pet of the Year." Since promotional activities constitute a large part of the duties of a "Pet of the Year", a model's participation in promotional activities for Penthouse is included in the summary. This portion of plaintiff's summary was not favorable, Zelmanski testified, because she had cancelled a television interview which had been arranged for her by Penthouse.[9] Additionally, Zelmanski testified that he had no knowledge that plaintiff had appeared in defendants' magazines until he was contacted by an attorney in connection with this lawsuit.[10]

Plaintiff alleged further damage in that she was humiliated by the publication of her photos in defendants' "raunchy" magazines. However, the photographs, poses and written material which appeared in Partner and Game are substantially similar to that which plaintiff voluntarily permitted to be published in Penthouse and the Girls of Penthouse. Plaintiff expressed no shame or humiliation at appearing nude and semi-nude in Penthouse or The Girls of Penthouse. The evidence also revealed that plaintiff had no objection to having her nude photographs taken at an apartment complex while residents of the apartment complex watched the picture-taking session. Furthermore, as noted earlier, plaintiff testified that she would not have objected to

these same photographs and stories which she now complains of being used by Penthouse, Playboy or other magazines of a similar nature.

It is not often that this Court reverses a jury. However, in this case there is absolutely not a scintilla of evidence to support a verdict in favor of the plaintiff and the verdict is clearly contrary to the law. Under these circumstances, the Court must, as the Court has done in this case, set aside the jury verdict. A jury verdict must be based on the law and evidence presented at the trial of the case and cannot be based on any other factors, as was apparently done by the jury in this case. Simply stated, a verdict in favor of the defendants was the only verdict that reasonable men and women could have reached in this case. Since no possible evidence was submitted at the trial which could support the jury verdict, and since the verdict is contrary to the law, the defendants' motion for directed verdict and judgment n.o.v. must be granted. In the alternative, and in the event the Court's decision to grant a directed verdict and judgment n.o.v. be reversed or vacated on appeal, the Court finds that defendants' motion for a new trial should be granted since the judgment is contrary to the clear weight of the law and evidence.[11] Plaintiff's motion to alter the jury's verdict and

for judgment n.o.v. must be denied in view of the Court's decision.

Therefore:

IT IS ORDERED that the Court's ruling of December 2, 1983, granting defendants' motion for a new trial be and it is hereby VACATED AND SET ASIDE.

IT IS FURTHER ORDERED that the motion of defendants for a directed verdict and for judgment nothwithstanding the verdict be and it is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's motions for alteration of the jury verdict and for a judgment n.o.v. increasing the jury verdict be and each is hereby DENIED.

Judgment shall be entered accordingly.

_____

UNITED STATES DISTRICT JUDGE

FOOTNOTES

1 The Court has followed the test for judgment n.o.v. originally set forth by the Fifth Circuit in Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), and most recently followed in Thornton v. Gulf Fleet Marine Corp., 752 F.2d 1074 (5th Cir. 1985).

2 See plaintiff's Exhibits 6, 8, 9, and 10.

3 For reasons which are not clear to the Court, Citrin was not named as a defendant by the plaintiff in this suit.

4 Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). See also Vitale v. National Lampoon, 449 F.Supp. 442, 445 (E.D. Pa. 1978).

5 See Time Inc. v. Johnston, 448 F.2d 378, 380 (4th Cir. 1971); Vitale v. National Lampoon, 449 F.Supp. 442, 445 (E.D. Pa. 1978).

6 See footnote 2.

7 Id.

8 It should be noted that Zelmanski was called as a witness for plaintiff.

9 Zelmanski depo., pp. 11-15.

10 Zelmanski depo., p.17.

11 Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); F.R.C.P. Rule 50(c); Neely v. Martin K. Elby Const. Co., 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967); Iacurci v. Lummus Co., 387 U.S. 86, 87 S.Ct. 1423, 18 L.Ed.2d 581 (1967).

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ANN HOCKERSMITH — CIVIL ACTION

VERSUS — NUMBER 81-965-B

PARTNER PUBLISHING COMPANY, INC., ET AL

JUDGMENT

For the written reasons assigned;

IT IS ORDERED AND ADJUDGED that judgment be entered vacating and setting aside this Court's ruling of December 2, 1985, granting defendants' motion for a new trial.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered granting defendants' motion for a directed verdict and for a judgment notwithstanding the verdict.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered denying plaintiff's motion for alteration of jury verdict and a judgment n.o.v. increasing the jury verdict.

Baton Rouge, Louisiana, May 15, 1985.

UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

May 23, 1986

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 85-3319 - Hockersmith vs. Partner Publishing Co.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

etc.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: s/Betty G. Martinez
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3319

ANN HOCKERSMITH,
Plaintiff-Appellant

versus

PARTNER PUBLISHING COMPANY, INC., ET AL
Defendants-Appellees

Appeal from the United States District Court
for the Middle District of Louisiana

May 23, 1986

Before WIDSOM, REAVLEY, and JOHNSON, Circuit Judges.

PER CURIAM:*

Plaintiff Ann Hockersmith, a model, brought this action against the publishers of Partner and Game magazines, Partner Publishing Company and Picadilly Publications, Inc. Plaintiff also sued the distributors of the magazines, Publishers Distributing Corporation and Flynt Distributing

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Company. Plaintiff alleged that she was defamed and her privacy invaded when nude and semi-nude photographs of her were published in the magazines published and distributed by the defendants. The jury returned a verdict generally in favor of the plaintiff, although the jury found that defendants had not violated Hockersmith's right to publicity. On post-trial motions, the district judge entered a judgment notwithstanding the verdict in favor of defendants. See Fed. R. Civ. P. 50(b). The district judge held that plaintiff failed to show that the defendants were at fault in relying on a consent form that plaintiff signed when she posed for the photographs. The district judge also held that the plaintiff had failed to show that the defendants had acted with actual malice.

We affirm the judgment of the district court. Plaintiff contends that the district court erred in relying on the consent form and argues that she intended the consent to extend only to Playboy magazine. However, the copy of the consent form introduced by the plaintiff herself indicates no such limitation. Nor does plaintiff persuade that she showed that the publisher defendants acted with actual malice in relying on the release. See **Wood v. Hustler Magazine, Inc.**, 736 F.2d 1084, 1090-93 (5th Cir. 1984), cert. denied, U.S. __, 105 S.Ct. 783 (1985). Likewise, the record indicates

no basis for plaintiff's contention that this Court should pierce the corporate veil and treat the publisher and distributor defendants as one entity.

Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

June 16, 1986

Mr. C. Lee Dupuis, Clerk
139 U.S. Courthouse
707 Florida Street
Baton Rouge, LA 70801

No. 85-3319 ANN HOCKERSMITH -vs- PARTNER PUBLISHING CO., INC., ET AL, (CA-81-0965-(B)

Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

etc.

Enclosed herewith are the folowing documents:

Copy of the Court's opinion.

Original record on appeal or review. (3 Vols.)

Original exhibits. (1 Env.)

etc.

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By:_____
Deputy Clerk

cc: (Letter Only)

Hon. Frank J. Polozola
Mr. Arthur Cobb
Mr. John Gross
Mr. R. Bruce MacMurdo

Supreme Court, U.S.
FILED
OCT 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANN HOCKERSMITH,

Petitioner,

vs.

FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT FLYNT DISTRIBUTING COMPANY, INC. IN OPPOSITION TO PETITION

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BRIEF OF RESPONDENT FLYNT DISTRIBUTING COMPANY, INC. IN OPPOSITION TO PETITION

PRELIMINARY STATEMENT

Respondent Flynt Distributing Company, Inc. ("FDC")[1] submits this brief in opposition to the apparent petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

The court below affirmed a judgment notwithstanding the verdict in an admitted public figure's invasion of privacy and false light

[1] FDC is a wholly-owned subsidiary of LFP, Inc. LFP, Inc. is also the corporate parent of Hustler Magazine, Inc. and Chic Magazine, Inc.

Neither Hustler Magazine, Inc. nor Chic Magazine, Inc. nor any of their officers were ever parties to this action.

action against the distributors of magazines that contained allegedly offensive material. The distributor defendants were FDC and Publishers Distributing Corp. ("PDC"), a now liquidated entity whose assets were acquired by FDC. The magazines were edited and published by third parties who did not appear at trial or before the court of appeals.[2]

There was no evidence at trial of actual malice on the part of either FDC or PDC. The petitioner Ann Hockersmith ("the plaintiff") has in fact admitted that no evidence was presented to the jury as to the distributors' knowledge or state of mind.

There are no special or important reasons that warrant review of the decision below. The decision below was on the basis of well-settled principles of libel and First Amendment law. The plaintiff does not, and could not, assert that the decision below conflicts with any decision by this Court or any other Court of Appeals.

The lack of significance of the decision below is evidenced by its issuance as an unpublished *per curiam* opinion.[3] Under former Fifth Circuit Rule 47.5, which was then in effect, the decision below has no precedential value.[4]

COUNTERSTATEMENT OF THE ISSUES

The petition raises the following issues:

1. Is the constitutionality of judgments notwithstanding the verdict and Rule 50(b) of the Federal Rules of Procedure settled?

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[2] These publishers were Partner Publishing Co. and Piccadilly Publication, Inc. The complaint named both publishers as defendants.

[3] The opinion below states:

> Local Rule 47.5 provides:
>
> "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal provisions".
>
> Pursuant to that Rule, the Court has determined that this opinion should not be published.

Petitioner's Appendix at 15.

[4] It should also be noted that, although she now does so in her petition, the plaintiff did not challenge the constitutionality of Rule 50(b) of the Federal Rules of Civil Procedure in the proceedings below.

2. Was the judgment notwithstanding the verdict in this case correct in light of the undisputed absence of evidence of actual malice on the part of the distributor defendants?

STATEMENT OF THE CASE

The facts of this case, the identity of the parties and proceedings below are summarized in the decisions of the Court of Appeals and the District Court. FDC and PDC would, however, supplement those summaries by pointing out the following:[5]

1. The plaintiff does not, and cannot, dispute her status as a public figure. She is a former Penthouse Magazine covergirl and "Pet of the Month" and has testified at trial that she aspired to become a celebrity. The plaintiff's brief below acknowledged that she was a public figure. *See* Appellant's Brief below at 15.

2. FDC is, and PDC was, in the business of distributing numerous magazines published by different publishers. FDC purchased the assets of PDC on March 17, 1980 and thereby assumed the responsibility of distributing magazines previously distributed by PDC. *See* Affidavit of Jim Kohls at ¶ 2.[6]

3. FDC does not in any way assist the publishers of the magazines it distributes in editing or preparing the content of those magazines. FDC also does not review or examine the magazines it distributes.[7] Kohls Aff. ¶¶ 11, 12.

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[5] In so doing, FDC and PDC will refer the Record filed with the Fifth Circuit on July 3, 1985 ("Record below") at the appropriate pages and to the trial transcript ("Tr.") at the appropriate pages.

[6] The February 3, 1982 affidavit of Jim Kohls (hereinafter cited to as "Kohls Aff." at the appropriate paragraph) appears at page 31 of the record below and was submitted in support of FDC's and PDC's motion to dismiss. The affidavit has never been contradicted.

[7] FDC does not even take physical control or possession of the magazines it distributes. The magazines are shipped directly from the publisher's shipping agent to local wholesalers who then sell the magazines to local retailers. Kohls Aff. 9.

Any review of the magazines it distributes would impose enormous financial burdens and logistical difficulties upon FDC. Kohls Aff. 11,12.

FDC distributes about 120 magazines a month. Prior to this action, these periodicals included the two magazines which contained the articles that are the subject of the plaintiff's complaint. Kohls Aff. ¶¶ 12, 3, 6.

4. At trial, the plaintiff failed to introduce any evidence as to FDC's or PDC's knowledge of the allegedly offensive magazine articles. The only live or recorded testimony that referred to the distributor defendants were statements by two witnesses that they did not know of either PDC or FDC.[8] *See* Tr. 74, 117-18.

5. At trial, the plaintiff's counsel twice admitted the lack of evidence as to PDC and FDC. The trial transcript shows that the first admission occurred when the plaintiff responded to the distributor defendants' motion for a directed verdict:

THE COURT:

> What evidence do you have to show they [*i.e.*, the distributors] knew what was in the magazine is what I mean?

MR. COBB:

> We have no evidence.

Tr. 203.

A second admission occurred during summation when counsel for the plaintiff further stated, "[t]here is no evidence what the distributing companies did." Tr. 235.

6. As noted in the opinion below, the plaintiff introduced a standard photographer's consent form at trial. *See* Appendix at 16. The form was signed by the plaintiff and waived any objection to the circulation or publication of nude and semi-nude photographs.[9] *See* Record below at 84, 89.

---

[8] The only documentary evidence that referred to the distributor defendants in any way were the listings of FDC as distributor inside the allegedly offensive magazine issues. Record below at 207.

[9] The plaintiff asserted that the consent form had been amended in handwriting to restrict use of the photographs. The consent form introduced at trial however contained no such restriction. *See* Tr. 114-15; Record below at 84,89.

7. The distributor defendants moved for a directed verdict at the end of the plaintiff's case. Tr. 197. The district court denied that motion but permitted the distributor defendants to renew their motion. Tr. 207. FDC and PDC renewed the motion for a directed verdict when they moved for a judgment notwithstanding the verdict. Record below at 220.

ARGUMENT

I.

THE CONSTITUTIONALITY OF RULE 50(b) IS SETTLED

The plaintiff's attack on the constitutionality of judgments notwithstanding the verdict under Rule 50(b) is without merit. "[I]t is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321 (1967); *see also Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940).

The practice of reserving questions of law and taking a jury's verdict subject to a ruling on those questions "undoubtably was well established when the Seventh Amendment was adopted, and therefore must be regarded as part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 660 (1935). In this case, the distributor defendants, in accordance with Rule 50(b), moved for a directed verdict before moving for a judgment notwithstanding the verdict. The district court reserved judgment on the earlier motion. *See* Fed. R. Civ. P. 50(b).[10] The judgment notwithstanding the verdict was consistent with the Seventh Amendment.

---

[10] Rule 50(b) provides that "[w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion".

II.

THIS COURT'S DECISIONS REQUIRED THE PETITIONER TO INTRODUCE CLEAR AND CONVINCING PROOF OF ACTUAL MALICE

A. The plaintiff is, by her own admission, a public figure. *See* Appellant's brief below at 15. She was accordingly required to prove by clear and convincing evidence at trial that the distributors acted with actual malice. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Evidence of subjective awareness is required to show actual malice. As this Court pointed out in *St. Amant v. Thompson:*

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

390 U.S. 727, 731 (1968). The test of actual malice is not whether the distributors acted as reasonable distributors would in the same circumstances but rather what their actual state of mind was at the time of publication.[11]

B. The plaintiff failed to present any evidence as the distributor defendants' actual state of mind. There was no live or recorded testimony by anyone who knew of or was familiar with the distributor defendants. *See* Tr. generally.

Counsel for the plaintiff has acknowledged the lack of evidence of actual malice. At trial, the plaintiff's counsel advised the court below that he had no evidence of the distributor defendants'

---

[11] It may be noted that actual malice is unlikely to exist where, as here, the defendants merely distributed material published by other persons. Distributors normally have no duty to monitor the materials they distribute for libelous conduct even where the plaintiff is a private figure. *See e.g.* W. Prosser & W. Keeton, The Law of Torts 810-11 (5th ed. 1984); *accord Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 139 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 2114 (1985).

knowledge of the contents of the magazines. Tr. 203. That counsel further stated in his summation that there was no evidence as to what the distributor defendants did. Tr. 235.

C. The court below was not bound by the usual standards of deference to jury verdicts but was instead required to review the record independently. In *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 1963-65 (1984), this Court held that First Amendment considerations prevent the usual deference accorded toward jury verdicts from applying to jury findings of actual malice. The *Bose* opinion explains the rationale for independent appellate review:

> The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. . . .
>
> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

104 S. Ct. at 1965. The *Bose* requirement of independent review of findings of actual malice further eliminates any doubt as the correctness of the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 9, 1986

APPENDIX

The following constitutional provision and Federal Rule of Procedure were not set forth in the Petitioner's Appendix. They are accordingly stated here.

The First Amendment to
The United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Rule 50(b) of
The Federal Rules of Procedure

> *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Supreme Court, U.S.
FILED
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CLERK

SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER 86-538

ANN HOCKERSMITH
Petitioner

VERSUS

PARTNER PUBLISHING CO., INC., et al
Respondent

On Appeal From the United States District Court,
Middle District of Louisiana, State of Louisiana,
Honorable Frank J. Polozola, Judge Presiding

REPLY BRIEF ON BEHALF OF ANN HOCKERSMITH

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5pp

Ann Hockersmith rebuts Flynt Distributing Company, Inc.'s, brief as follows:

ARGUMENT NO. 1

FDC states, "The constitutionality of Rule 50(b) is settled."

Petitioner is **not** arguing the constitutionality of Rule 50(b) when it is applied properly. Here, Rule 50(b) was not applied properly.

Rule 50(b) should be applied only as to **questions of law.** In this case, Rule 50(b) was applied to as **questions of fact.**

Plaintiff does question the constitutionality of Rule 50(b) as to questions of fact.

Whenever a court rules that there is "lack of evidence", (i.e., that the "evidence" preponderates, 51% vs. 49%, or 99% vs. 1%, or even 100% vs. 0%), the court is ruling on the **facts.** The Seventh Amendment **mandates** that the jury decide the **facts.**

Rule 50(b) can constitutionally be applied **only** as to questions of law.

ARGUMENT NO. 2

FDC states that, "This court's decision requires the petitioner to produce clear and convincing proof of actual malice", and that Ann Hockersmith did not.

FDC has been playing Ring Around the Rosy with words in this case.

FDC states, "We are merely distributors", therefore, "we have no duty" to monitor the materials we distribute even if libelous.

If FDC is merely a "distributor", then it is **not** entitled to First Amendment protection, which protects "Freedom of Speech" and "Freedom of the Press". If FDC is merely a "distributor", then it is not "speaking" and it is not "publishing" and, therefore, the First Amendment rights do **not** apply.

FDC cannot have its cake and eat it, too. It cannot claim it is merely a distributor and has nothing to do with publishing the material, and at the same time claim the protection afforded to "speakers" and "publishers" under the First Amendment.

If the First Amendment applies to FDC, then FDC is either "speaking" or "publishing" and, if so, it had to know what it was speaking and had to know what it was publishing. It then stands in the same shoes as a speaker or a publisher. As such, Ann Hockersmith had the material (the two magazines) that it "spoke through" or "published" and they were presented to the jury with her testimony to the fact that the stories were totally fabricated by the imaginations of the writers and publishers and, therefore, Ann Hockersmith did prove **actual malice by clear and convincing** evidence.

CONCLUSION

Flynt Distributing Co., Inc. really did know the content of its magazines, since it had been financing the publishers and distributing the magazines for years.

Respectfully Submitted:

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CERTIFICATE

I hereby certify that three copies of the Reply Brief were mailed, postage prepaid, to Mr. Lawrence Kill (Counsel of Record), 666 Third Avenue, New York, New York, 10017 on 17 October 1986.

ARTHUR COBB